UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

v. 17 Civ. 274 JPO

EQUITY RESIDENTAL
ERP OPERATING L.P.,

Defendants.

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February 24, 2017
11:36 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
BY: LI YU,
JACOB LILLYWHITE,
LAUREN LIVELY,
Assistant United States Attorneys

BAKER & HOSTETLER, LLP (NYC)
Attorneys for defendants
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TORELLO H. CALVANI, Esq.
Of counsel

(In open court)

THE COURT: Good morning, everyone. The first case is United States versus Equity Residential, 17 Civ. 274.

(Case called).

THE COURT: Good morning. All right.

We're here to address the issues raised in the government's letter, dated February 6th, and defendants' response, dated February 9th.

I have before me a request in this case by the government for expedited discovery in the form of inspection of apartments and common areas at the rental building at 170 Amsterdam Avenue, as I understand it, so let me hear first from counsel for the government.

MR. YU: Thank you, your Honor.

THE COURT: Mr. Yu?

MR. YU: Yes.

THE COURT: Mr. Yu, could you first address, before you go into whatever you want to focus on, could you first address the first point made by defendants, which is that the owners of the building have not been sued.

MR. YU: Your Honor, in this case Equity Residential is a major corporation that owns and operates and develops properties across the country.

In this case, while it is the case that the direct owner of 170 Amsterdam is not Equity, Equity is the parent of

the owner, and what we believe ultimately the facts will show and we allege in the complaint is that Equity itself was directly involved in the design and construction of this building.

Under the prevailing standard under the Fair Housing Act, when a party or an individual is directly involved in the design and construction of a property, and if that property does not comply with the requirements, that party is liable irrespective whether or not it is the direct owner or further up the corporate chain.

The kind of proof we expect to adduce, whether it is at the preliminary injunction hearing coming up or at trial, would be things like Equity's executives are directly involved in making decisions about the design and construction decisions as the properties developed, Equity's people controlling the decision-making of the subsidiary that actually owns the building.

THE COURT: It is the ultimate owner, you're saying?

MR. YU: The ultimate owner and ultimate decision-maker, your Honor. Your Honor, if I may sort of just to start with, what we are seeking here is a single item of discovery. We are asking for an inspection of one building that is controlled by Equity.

I'll begin with a very quick summary of the background, and I kind of want to address four questions which

are raised in the briefing:

The first is how an inspection may shed different light or produce different types of evidence from the testing that has occurred already;

Second, the timing, why timing of the inspection is important;

The third is why we haven't yet filed a PI motion, which Equity raises; and

The last is whether or not there is undue burden.

So first in terms of background, your Honor, we believe that this case really goes to the heart of the design and construction of apartments. Congress enacted a statute because historically housing frequently didn't take into account needs of people with disabilities. In 1988, Congress amended a statute to require that new housing built after 1991 must meet the basic requirements of accessibility.

So here Equity, as I mentioned, it owns a lot of properties, some of which it actually acquires, but many of those Equity self was involved in building. We are focused on the one Equity itself was involved in building.

As we described in the complaint, Equity was sued in 2006 in the District of Maryland for engaging in a pattern and practice of Fair Housing Act violations, building a number of properties, residential properties that did not comply with the Fair Housing Act.

In March of last year, the court in Maryland, Chief Judge Blake, I believe, actually entered summary judgment against Equity, finding it, in fact, violated the Fair Housing Act in design, accessible design and construction provisions in relation to seven properties which are, I believe, in generally three areas across the country; California, Massachusetts and the Washington, D.C. area.

THE COURT: This lawsuit is about how many properties?

MR. YU: Your Honor, this lawsuit is directly about the 170 Amsterdam Avenue property which is in Manhattan itself.

THE COURT: Only about that property?

MR. YU: As well as that property and as well as injunctive aspect has to do, injunctive aspect of the case has to do with five properties that we understand are currently under construction or nearing the end of construction. Those are located in different areas in the country, some on the West Coast and one or two in DC, and those are at least, according to the public filings Equity has made, those are expected to be completed in this calendar year, some in the spring and some in the fall.

Given the background, so late October of last year there was a testing done at 170 Amsterdam, and so there were two testers who posed as renters who went there. They looked at four apartments, and just based on those four apartments they looked at, they identified three types of inaccessible

conditions which are described in Paragraph 12 in the complaint.

Now, I just want to clarify one issue about the difference between testing and the inspection because Equity is suggesting that well, if the buildings have already been tested, why is there a need for further inspection?

The difference is testing by its nature is limited to what apartments are available, and even though the testers are briefly posing as potential renters or relatives of renters, while they can take measurements, it is limited by how much time there is and which apartments happen to be available at a given time. Here they could only see four apartments, when the building itself, as defendants' counsel has explained, actually has 26 types or 26 lines of apartments.

The difference is the inspection would be, an inspection actually would involve, we ask for is for an accessibility expert who is retained by the government to go in there and look at each type of apartment.

THE COURT: All 26 types?

MR. YU: 26 types of apartments, look at each type of condition, and so it would be different in three ways:

One, it will be very objective. We are going to have -- these are photos we have from a prior inspection, for example, where there is going to be objective record of each condition, photograph of how it is measured and what the

measurement shows. It will be systematic in the sense of the inspector goes to the building, looks at every type of apartment and every type of condition rather than him being rushed in the context of looking at available apartments. It will be comprehensive. There will be a report generated at the end of the process.

All of this we believe is very helpful because to the extent as we move forward into a preliminary injunction proceeding, that will be a full record for the parties and for the court to look at in terms of how many conditions there are, whether they're pervasive conditions or isolated conditions.

THE COURT: You acknowledge, I assume, that this is a fairly significant hardship. This is a rental building and the landlord has to give notice. You are walking into apartments where people are living?

MR. YU: Yes, your Honor. I think we make this point in the letter, and the idea -- let me take a step back.

We acknowledge, as per defendants, they do need to give notice to their tenants at some point. We are going into these apartments. Fundamentally, we don't think the issue is going to be any different as the case moves forward because here we are asking for doing this sooner, but because as we understand from defendants' counsel, while the fundamental disputes in this case on the facts is going to be are there in accessible conditions and, if so, how many inaccessible

conditions there are at 170 Amsterdam Avenue. That will be one of the basic factual disputes in the case.

The way to resolve that at this stage or a later stage will be through an inspection. An inspection will need to take place, in our view, no matter what happens in this case, and so given that burden is not any different, it is simply a matter of when this happens versus whether or not this happens.

Given the sequencing of that burden, we believe it doesn't really change the dynamic especially given, if I may briefly address it, some of the other concerns the government has. So there is a basic question about timing and irreparable harm which defense raises here.

Timing is very important, in our view, because as we mentioned earlier, and the thing is, as defendants' public filings show, there are these buildings which are currently under construction. There 1500 or 1600 rental units in these five buildings which would become available once construction is completed.

Our concern is if, in fact, we have a history of Equity building buildings with many types of inaccessible conditions, we have already evidence through testing in 170 Amsterdam there are already inaccessible conditions in the four apartments shown. If we identify dozens more inaccessible conditions there, that raises a strong likelihood that unless something is done, the same problems are likely to recur at

these ongoing constructions.

That basically means these new buildings will go on the market and they wouldn't comply with what Congress says is required for new buildings. That is creating irreparable harm in a couple of different ways:

First, any time you have a violation of a statute under the civil rights laws, that creates a presumption of irreparable harm. More specifically, such an abstract issue because what happens, your Honor, if you can imagine, so let's say eight months from now a new building opens, some of the units are accessible but others are not, whether that creates a scenario where people are able-bodied can rent any of the apartments in the building, but people who were disabled and only having access to some of the units or a few of the units, and basically you have people with disability being treated in that case as second-class citizens. That is the scenario Congress specifically wanted to not happen when it enacted this requirement under the Fair Housing Act.

THE COURT: If that is all true, why haven't you moved for preliminary injunction?

MR. YU: The last point.

Here this request for an inspection happened in the context of ongoing discussions the parties already had. In those discussions defendants raised several points about whether there are inaccessible conditions at 170 Amsterdam, how

isolated they are. Their position seems to be even if there are inaccessible conditions, they're limited to perhaps just these four units, which we are skeptical. I guess in theory it is possible, so it happens these are the four units that aren't accessible and on the day the tester went there they happened to see just these four units.

Ultimately, we don't believe the parties are willing to speculate as to that question before we proceed because an inspection will create a pretty clear record. From our side, the reason we want to wait for a chance to do the inspection is we believe that that will inform our decision what kind of injunction to seek and ultimately whether to seek the injunction at all because if defendants are right, there are only inaccessible conditions in these four units or only five units, the government may end up revisiting that question.

Our concern is at this point is if people saw four units and they identified X number of conditions, and if there were 26 types of units out there, there may be a lot more issues that exist that we are not aware of, and that will help the parties and help the court in terms of ultimately assessing the preliminary injunction question.

Ultimately I suppose we could file a PI motion, but it seemed to us that given the inspection, it is something that can be done discrete in time and at a discrete level with efficiency, and not wasting the court's time really favors

doing the inspection first so that the parties can assess this question before we move forward with litigating what can be a very contentious issue before the court.

THE COURT: Is there specific authority for inspections as part of sort of standard discovery in Fair Housing Act cases?

MR. YU: Your Honor, there is no specific authority.

We cite to Rule 34 which provides inspection of premises, and that is a typical practice that is done. In fact, I believe this is the 13th of 15 cases our office has filed in this district alone involving similar type of issues.

Typically we agree on an inspection protocol with the defendants, and this is generally understood to be part of how Fair Housing Acts are litigated. The statute itself doesn't provide for a specific authorization, but the rules, the federal rules provide for an inspection in this situation.

Again just going back to the earlier point, because -- and this is a point the Maryland court recognized -- the Fair Housing Act's accessible requirements are reflected in a series of regulatory safe harbors objective and comprehensive. So it follows that in order for the court and the parties really to assess how well buildings comply or don't comply, it is important to kind of have a comprehensive and objective set of evidence to compare here the conditions that exist and here is what the law requires. That is why we think an inspection is

very important.

THE COURT: What exactly -- I know there is an attached draft request for inspection which sets forth dates, I believe three days, 8:30 to 5:30 at 170 Amsterdam Avenue for inspection of all common areas and each type of unit. I assume that is what you're looking for. What is the date you're looking for?

MR. YU: We explain in the cover letter to that inspection request. We want to be flexible and accommodate whatever concerns within reason within the context of this case, the scheduling concerns the defendants have.

Right now our expert who is going to do the inspection has availability for three weeks from March 20th, he can be here Sunday night, March 19th, and he can be here at any time between March 20th to I believe April 7th, which is a Friday. He has availability for that three-week period. We hope to do it consecutively, but we can certainly work around the schedule with the defendants.

THE COURT: Okay. Thank you, Mr. Yu. I'll hear from counsel for defendants. Let me start by asking, I think you have a March 3rd date for answering or responding to the complaint. Is that right?

MR. WHITE: Yes, your Honor, a week from today.

THE COURT: Are you filing an answer?

MR. WHITE: No, we will not.

THE COURT: You're filing a motion?

MR. WHITE: Yes.

THE COURT: Under what rule?

MR. WHITE: Rule 12.

THE COURT: (b)(6) or (b)(1)?

MR. WHITE: (b)(6), and one other subsection I can't remember.

THE COURT: Can you give me a highlight.

MR. WHITE: Not a silver bullet, destroy-the-case kind of motion, your Honor, it is a we can do better in terms of pleading kind of motion.

THE COURT: They can do better?

MR. WHITE: They can do better, I meant.

THE COURT: Are you requesting a stay of discovery in connection with that motion?

MR. WHITE: No, your Honor.

THE COURT: My question for you is, these kinds of inspections are pretty standard, it sounds like. I know I've heard about them in other similar cases. As a litigator, I had limited, but some involvement with Fair Housing Act litigation, and I know that that has been arranged and it is fairly common.

If it is going to happen at some point, why not in the next month or two?

MR. WHITE: First, let me be absolutely clear. I agree 100 percent that inspections of properties in the context

of cases of this type are a normal part of discovery. Our problem is not that some day an inspection, inspection of 170 Amsterdam will occur. Our problem is what is the rush? Why do we have to bend the rules? The government bears the burden to explain why the rules need to be bent.

In this case, all the government is offering is well, we think, we think we plan on someday filing a motion for preliminary injunction. They're not very specific about what that motion might say, which automatically kind of ties one hand behind my back in terms of a fair fight. Allowing discovery when I don't even know what exactly the issues are going to be might be a little unfair.

THE COURT: Have you had discussions that indicate to you what the, let's call them violations of safe harbor portions provisions of the Fair Housing Act -- I think it is four tester apartments, what the nature of those violations are?

MR. WHITE: All we really know about that is what the complaint tells us, which is not very much.

THE COURT: But an inspection is an inspection. The government comes in with their expert inspectors, take pictures. If there are violations of accessibility in an apartment, you kind of know what the universe of possible violations are. I assume, we can sort of think about the types of violations, a limited universe of types of violations, and I

don't know how there is prejudice to you in terms of this is not like an interrogatory response where you kind of need to know. It is kind of a thing that exists in the world and they're going to take pictures at some point. I am still not clear on how there is prejudice to you having it done now versus later other than being annoying.

MR. WHITE: Putting aside the latter observation, I would simply quote from the only case we could find where someone asked for expedited discovery because they intend to file a preliminary injunction motion, which preliminary injunction motion, according to what they said, involved appointing a special master, if you will, to oversee construction projects going on in other states, and that's the Disability Rights Center case which is cited in our papers.

It is the only case that we could find that approaches what the government has told us their anticipated preliminary injunction is going to seek. It doesn't have anything to do with 170 Amsterdam. It has to do with ongoing construction projects in Seattle, San Francisco and Washington, D.C.

If that's where the fight is going to be when we get to preliminary injunction, first I am having trouble making the connection between 170 Amsterdam, a building that has been completed for two years that had a different general contractor, a different architect, different owner than any of those other properties.

How is 170 Amsterdam going to be revealing about what is going on at those projects? I am also quite confident that in this systematic disparate treatment case where the government's burden is to show we intentionally discriminate, we intentionally disregard the Fair Housing Act, they will not be able to do that because my client does not, in fact, do that.

Just by way of example, we have our own Fair Housing Act consultants who consult on all three of those other properties and are doing so on an ongoing basis throughout the construction. So the relevance of the inspection of 170 Amsterdam to an injunction seeking a fair housing monitor on those projects is, frankly, lost on me.

THE COURT: If there are widespread violations in defendant-owned properties and there is a pattern here, you know, the case that is before Judge Blake, the other establishments, that would tend to make more probative the idea that there is a pattern here.

MR. WHITE: Respectfully, your Honor, I spent 10 years of my life on that case before Judge Blake. It was filed in April of 2006, and we finally resolved it in December of 2017. I know the details of that case intimately.

Judge Blake's opinion to which Mr. Yu referred addressed seven properties out of over 300. The defendant prevailed on motion for summary judgment on 14. That case

involved properties that were under construction a decade ago. It has nothing whatsoever to do with this case and it couldn't be offered for the truth of the matters asserted in any event.

The fact of the matter is this is a new case involving different properties, different circumstances, and the question is why are we in a rush? Should we bend the rules? Will there be an inspection? Absolutely. But the only reason to rush is the government's professed worry that something might be going on in Seattle, Washington or San Francisco. That's it.

THE COURT: Fair enough, fair enough. I see your point. You're saying it is too attenuated of a connection, although there is some connection probably.

MR. WHITE: That is one of the requirements under Notoro, that there be a connection.

THE COURT: Assume the standard is the kind of flexible standard in terms of expedited discovery, it is all the factors, it is a judgment call by the district court, which is why I'm here.

The question I have is, you just told me you're going to answer the complaint next week -- or not answer. You're going to move to dismiss, but not seek a stay of discovery, acknowledge this inspection is going to happen.

My question is why not have the inspection happen between March 20th and April 7th?

MR. WHITE: Again, having conceded that inspections

are a normal part of discovery in cases such as this, which I don't dispute, I will describe some of the inherent difficulties. I have been on 20 or more of these myself. I have encountered the little dogs that for some reason didn't want people in the apartment that day. I have encountered the women who forgot they had the appointment and were dressed in a towel. I have seen the vases that were knocked off the coffee tables.

THE COURT: Do you go on the inspections?

MR. WHITE: Have I been on them? Yes, I have been there. These are intrusions into people's homes. There is no other way to put it. The toys are all over the place, all the circumstances one would expect to find when one enters another individual's apartment.

THE COURT: All those things, the towels and dogs and everything, that happens whether it is in late March or in July?

MR. WHITE: There is no doubt that is true. As the landlord, you try to do everything you can to not deliberately make your tenants angry. The only way to do that is carefully, conscientiously target a date out there in the future, do your best because I think it is important to remind the court, we don't have the ability to insist. If they just say flatly no, are we going to default them under their lease? We can't.

THE COURT: Isn't there a right of the landlord?

MR. WHITE: A right of reasonable entry for certain things. This doesn't happen to fit one. An inspection because you're being sued isn't automatically one of those categories.

This is us saying pretty please, and I will inform the court we have been fairly successful at achieving that kind of cooperation from our tenants as long as there were some restrictions on number of people, restrictions on the amount of time. You don't spend an hour walking around somebody's home.

There were adaptations made for people who weren't home, but had pets, the usual thing that you can imagine, but it takes a lot of planning. It is a lot of work, especially because, as Mr. Yu indicated, the expert, so to speak, usually has a little tiny window they would like to get it all done. If you could spread it out over, for example, common areas, no problem, you can do that easily. You don't have to ask permission to go to common areas, but to get it all done in a discrete time-frame, it takes lots of planning.

That is the only point here, together with the absence of any of the criteria the case law holds for expediting discovery over and above the normal rules. The building is not going anywhere. We are not infringing, we are not counterfeiting, we are not doing any of the normal things associated with a desire to put a stop to something and expedited discovery to accomplish that. That building is there. It will always be there.

The inspection, we acknowledge, will occur. It is just doing it on an expedited basis, particularly the one that was proposed, no good reason, a lot of work, probably couldn't do it to the extent it was requested.

THE COURT: What do you mean by that, that last point?

MR. WHITE: Every unit of a certain type, 26 out of I think 260 or maybe 300 -- in other words, a very particular bullet point, not just a random call to your easiest 30 tenants and see if they'll agree to this. It has to be 26 unit tenants. That is 26, and that reduces your universe to -- I don't know the dispersion of the 26, I am sorry.

There might be only four apartments of one type, so that gives you just four tenants, and one of them has to answer the pretty please call.

THE COURT: But at any point, assuming you all can arrange this within a three-day period, it is going to be challenging at the end of March and early April and similarly challenging in August or September. I am still not hearing why -- I know you have a legal argument which is well made about bending the rules, but just as a practical matter, I am still not hearing how it is that much worse at the beginning of April than August or September.

MR. WHITE: Not knowing anything about the tenant reaction, I can't make a compelling argument that says the aggravation level will be any different in August than it is in

April. I can say the run-up planning is very important and particularly if it has got to be a comprehensive kind of inspection.

The agreements that we will have to make with the government about who pays for the vase that someone knocks over, bumps the table and knocks it on the floor, that kind of thing, that normally is not a problem. The amount of time we are going to tell people that people will be in the room, how many people, those kinds of sort of protective order things, we can work those out. I am not worried about that.

The principal objection I have here is accelerating the case towards a preliminary injunction hearing about which I know nothing because there is no motion on file; and, therefore, I don't get to be much of a beneficiary of expedited discovery because I don't know what the issues will be. Mr. Yu has a plan, apparently. He wants expedited discovery to pursue it. I don't know what the plan is. I don't have the same opportunity to participate in the expeditedness of the discovery. That is where I think -- and the only reason offered for even doing it is well, we're worried, we're worried about projects under construction.

Logic will say we'd be here talking about those projects, not 170 Amsterdam.

THE COURT: Mr. Yu, would you like to respond.

MR. YU: Your Honor, just very quickly.

I want to bring up a couple of points. Let me first address the question whether discovery will be a one or two-way street. I was a little bit surprised because they started the process, defendant reached out to us to ask us about factual questions once we filed the complaint. We reached out to Mr. White and said we want to do an inspection, make it a two-way street.

If you guys want to do it quickly, we are interested in moving quickly as well and we are willing to do that at this point. If there is an expedited inspection, we will answer questions and produce documents if defendants wanted and so every party will be in the same position. That won't be an issue for us.

In terms of the specifics, what we are seeking, Mr. White has sort of alluded to this. We actually provided Equity with a sample of the kind of injunctive terms we are thinking about, and we sort of actually invited Equity at some point -- I don't want to go too far into settlement discussions, but broadly invited Equity's input. They didn't give us input. I don't think it is fair to say they don't have a sense of the kind of relief we are seeking.

THE COURT: Is the preliminary injunction relief you're seeking, does it have anything to do with 170 Amsterdam?

MR. YU: No. The preliminary relief we are seeking focuses on ongoing construction. These are things we don't

have access to now. They're in construction. A, they want us to have inspection people go into construction site because the conditions may not be there yet; and, B, they approach probably much larger safety issues.

The nature of the preliminary injunction, as the court noted, is a question of pattern. If for a number of years Equity was aware of the problems as identified in the Maryland case, and if after the case has been in litigation for a period of time they built a new building that has endemic problems, as we think the inspection will likely show, and we just note the second attachment to our letter which is actually part of an annual report, that 170 Amsterdam is one of the properties identified as one of the Equity properties under construction there.

All the other parties where we are talking about that would be part, potentially part of the preliminary injunction are in the same table. The idea there is nothing tying these things together, we don't think, will be borne out by the evidence. What we expect the evidence will show is that Equity has a coordinated and centralized development and construction practice. These are people, the ultimate decision-makers are the same whether the building is here or in San Francisco or somewhere else. Because of that, the same issues that occur here, there is a strong likelihood they would be a problem somewhere else unless there is some process through which they

can be addressed before the building opens up for residents.

THE COURT: Well, I am going to grant the request and direct the parties to attempt to seek resolution on a three-day period in the period March 20th to April 7th identified by the government. This is even though I think defendant makes a good argument about the cart coming before the horse in a sense, in that the government is seeking expedited discovery in order to file a preliminary injunction, which is not the usual way of doing things.

However, the reason I am persuaded that the overall standard of good cause is met is because I think it is appropriate in this case to start discovery anyway in the case because we're essentially, we will be soon at the point of doing that. I am going to direct the parties to submit within -- let's see, the motion or answer is due March 3rd -- I will direct the parties by March 10th to submit a case management plan. On the court's web site there is a proposed case management plan under my page on the Southern District web site, and I will direct the parties by March 10th to attempt to reach agreement on the case management plan.

Given I am beginning discovery and I think it is appropriate to have inspection early in the discovery period, in any event, I am going to direct the parties to work out a three-day period in that March 20 to April 7th period to arrange for the inspection. It seems clear the inspection is

going to happen at some point.

I think the tester information gives some basis to go forward with the case on the ground that they may argue you believe there are Fair Housing Act violations here, and I think that is enough to warrant an inspection at some point, and defendant doesn't really contest that. It might as well be early in the discovery period, all right?

MR. YU: Thank your Honor.

THE COURT: Thank you, folks.

We're adjourned.

(Court adjourned)